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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1204

ALAN DALE HAIFLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 432 F. 2d 1064.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1970. A petition for rehearing was denied on December 8, 1970. On January 6, 1971 the petition for a writ of certiorari was filed. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's local board properly denied his claim to conscientious objector status, first made after he had been ordered to report for induction.

2. Whether the local board erred in refusing to reopen petitioner's 1-A classification at the same time it denied his conscientious objector claim.

3. Whether petitioner was accorded a fair and impartial hearing at his personal appearance before his local board.

4. Whether the granting of a ministerial (IV-D) deferment for a two-year period to those registrants qualifying under 32 CFR 1622.43 unfairly accelerated petitioner's order of call to induction.

STATEMENT

After a non-jury trial in the United States District Court for the District of Colorado, petitioner was convicted of refusing to submit to induction, in violation of 50 U.S.C. App. 462(a). On April 10, 1970 he was sentenced to an indeterminate sentence under the Youth Corrections Act. The court of appeals affirmed (Pet. App.).

Petitioner, born in 1947, registered with his local board in Englewood, Colorado, and was initially given a student (II-S) deferment. In April 1968,

after he left college, he was classified I-A (Tr. 14).[1] He appealed and the appeal board unanimously affirmed the classification (Tr. 17-18);[2] petitioner was ordered to report for induction in August 1968 (Tr. 27-28). On the scheduled date, he reported but refused to submit to induction. In June 1969, he was convicted under 50 U.S.C. App. 462(a), but on motions for new trial and arrest of judgment, the trial court set aside the conviction because petitioner had been improperly processed at the induction station (Tr. 35-36; SS File 51); the court expressly stated, however, that its action was without prejudice to further processing of petitioner by Selective Service officials (SS File 51c).

The State Director, on receiving the court's dismissal order, advised the local board to treat petitioner "like any other registrant of his age and with his classification" (Tr. 36, 67-68; SS File 52). Since his I-A classification had not been affected by the court order, the clerk of his local board, pursuant to the authorization given her to perform ministerial functions (Tr. 23-24), included petitioner in the group of registrants being ordered to report for induction on July 24, 1969 (Tr. 23-24, 36, 41, SS

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[1] "Tr." refers to the one volume trial transcript. "SS File" refers to petitioner's Selective Service file, admitted as an exhibit at trial. We are presently lodging both transcript and file with the Clerk of this Court.

[2] The basis for this appeal is not known (Tr. 17, SS File 70), but it clearly was not due to any conscientious objector claim (Tr. 19).

File 53-56).[4] After receipt of this induction notice, petitioner requested SSS Form 150, the Selective Service questionnaire furnished to registrants seeking to claim conscientious objector status (Tr. 42-44, SS File 57). His scheduled induction was thus postponed (Tr. 45, SS File 62, 63).

Petitioner signed the questionnaire and returned it otherwise uncompleted (SS File 58). In a separate letter (SS File 58a-58b), he stated his reasons for not using SSS Form 150 and set forth his beliefs in some detail. Briefly, petitioner stated that the form was inapplicable to him because he allegedly could neither serve as a non-combatant (Statement A of SSS Form 150) nor perform alternative civilian service in lieu of induction (Statement B of SSS Form 150). He described his conscientious objector beliefs in the following terms:

> * * * I support and would participate in those wars of national liberation such as the one in Vietnam or in the United States * * *, I consider myself a selective CO.

It was in high school, he wrote, that he first gained awareness of the true nature and history of the United States and began to understand its historic racism and violence. His college experiences and membership "in the Resistance and Students for a Democratic Society" had, he stated, solidified his opposition to institutions such as the armed forces of the United States which destroy that which is decent and creative. He claimed to have been outspoken in

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[4] Petitioner was not a delinquent registrant (Tr. 25).

his opposition "concerning the draft at countless meetings, rallies, demonstrations and other events in Colorado in the past 18 months" (SS File 58a-58b).

On July 23, 1969, the local board requested that petitioner personally appear before it to discuss his claim (Tr. 45-46, SS File 61). Before meeting with him on the 25th, the board reviewed his file (Tr. 46); the scheduled meeting lasted approximately fifteen minutes (Tr. 47). Petitioner told the board that his opposition to war was not religious (Tr. 48-50); that he was not entirely in agreement with the United States form of government; and that he was a "Selective Conscientious Objector, because of the war in Viet Nam, our foreign policy and other reasons" (SS File 64). He revealed, however, that he was then employed by Ace Box Co., which made "boxes to ship ammunition to Viet Nam" (SS File 64).

The board determined that the information submitted did not warrant a change in classification (SS File 64) and would not have even if an induction notice had not been mailed to petitioner prior to the filing of his claim. Moreover, since there was no evidence of a change in petitioner's status due to a circumstance beyond his control, the board concluded that it was without authority to reopen his classification in the post-notice situation presented (SS File 64).

Petitioner was again ordered to report for induction (SS File 65). On August 14, 1969, he reported and was found acceptable but refused to submit to induction (Tr. 82-83, SS File 67).

At trial, petitioner testified that it was after receipt of his 1969 induction order that he first requested SSS Form 150 (Tr. 70), and that he had been motivated to do so because of a decision in a Selective Service case in Boston in March 1969 (Tr. 85); he stated that he then "began to reconsider filing [a conscientious objector claim] with the Board just to see what would happen" (Tr. 71, 85). He told the court he was not a pacifist but was "conscientiously opposed to what they're doing in places like Vietnam" (Tr. 71-72), and indicated a willingness to perform "C.O. type work" (Tr. 76). Petitioner stated that he had held these views for some months prior to the receipt of the 1969 induction notice and added that the local board should have known this from his publicized actions in working against the operation of the draft (Tr. 21, 81-83, 85).

ARGUMENT

1. There was a plain basis in fact for the action taken by petitioner's local board. It is undisputed that petitioner's conscientious objection is directed solely to the war in Vietnam, and not to participation in war in any form (SS File 58a, 64). There is every indication that his views, whatever they may be, are not derived from "religious training and belief," even as that phrase has recently been interpreted by this Court in *Welsh* v. *United States*, 398 U.S. 333 (Tr. 48-50), but rest "solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 342-343). Thus, the claim does not even fall within the selective conscientious objector concept

presented to this Court in *Gillette* v. *United States*, No. 35, this Term. Moreover, the board could properly consider petitioner's employment at the Ace Box Co. (SS File 64) as casting doubt on the sincerity of his claim.

2. Both parties agree that the local board carefully considered petitioner's claim, even according him a personal interview before denying the conscientious objector classification. Thus, the question relating to post-notice claims now before the Court in *Ehlert* v. *United States*, No. 120, this Term, is not involved in this case. Even so, petitioner contends that the board erred in failing to reopen his 1-A classification—thereby foreclosing the opportunity to take an administrative appeal—*prior* to acting on his post-notice claim. However, this argument overlooks the plain language of the Selective Service reopening regulation (32 CFR 1625.2), which expressly prohibits a local board from reopening in the post-notice situation unless it "first specifically finds" a change in the registrant's status due to circumstances over which he had no control. Consequently, the pre-notice rationale of *Mulloy* v. *United States*, 398 U.S. 410—that a reopening under 32 CFR 1625.2 is required on presentation of a *prima facie* claim—has no application once the order to report for induction is mailed. See our petition for a writ of certiorari in *Laird* v. *Capobianco*, No. 611, this Term, pp. 7-9;[*] *Passel* v. *Laird*, 420 F. 2d

[*] We are providing petitioner's counsel with a copy of this petition.

1169 (C.A. 2). Nevertheless, we point out that, even if the *Mulloy* rationale were applicable here, the refusal by the board to reopen would be entirely correct, for petitioner has failed to meet even the most minimal requirement of stating a *prima facie* claim.

3. The contention that the personal appearance before the local board was conducted unfairly is without merit. Petitioner was apprised of the nature and purpose of the meeting (SS File 61), and the discussion he had with the board members was fully consistent with the stated objective for his appearance (SS File 64). Even assuming, as petitioner contends, (Pet. 28), that the board's questions did not focus on the time sequence indicating when petitioner's beliefs actually matured, we point out that on the facts of this case such questioning was not necessary. Even under the rationale of *United States* v. *Gearey*, 368 F. 2d 144 (C.A. 2)—a decision which we believe is incorrect (see our brief in *Ehlert* v. *United States*, No. 120, this Term) but which the Tenth Circuit has recently followed[6]—reopening on the basis of a post-notice conscientious objector claim can occur only if the local board first finds "that the applicant's beliefs ripened only after he received his notice, *and* that his beliefs qualify him for classification as a conscientious objector (368 F. 2d at 150; emphasis supplied). Since the latter requirement in this case clearly had not been met, there

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[6] *United States ex rel. Brown* v. *Resor*, C.A. 10, No. 74-70, decided July 21, 1970.

was no need to question petitioner on the former point.[6]

There is, moreover, absolutely no evidence that the board acted out of a bias against petitioner (Pet. 27-29). Indeed, in 1967, after petitioner destroyed his draft card, his local board had specifically recommended that his induction not be accelerated (Tr. 68). Nor was his induction accelerated in 1969, when he was ordered to report for the second time (Tr. 67).

4. Petitioner, at trial, called the State Director of Selective Service to testify as to the practice in the State of Colorado of deferring for two years members of the Latter Day Saints who qualify for a ministerial (IV-D) classification (Tr. 62-66). See 32 CFR 1622.43. Petitioner contends that this practice is unfair as to him in that it results in the earlier call-up of registrants who are not members of the Latter Day Saints. This is a speculative argument and petitioner lacks standing to raise it in these proceedings, since he has not sought similar deferred status and had his claim denied because he was not a member of his religious group. *Cf. Breen* v. *Selective Service Board*, 396 U.S. 460.

Even assuming standing, however, the argument has no merit. The state director testified that the deferment is assigned only to registrants who have demonstrated that they "are ordained, and * * * are

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[6] Moreover, petitioner's testimony at trial made clear that his views were established well before the order to report.

full time" (Tr. 66), as required by 32 CFR 1622.43 (Tr. 64). The fact that there are a number of Mormons in Colorado able to make such a showing in no way suggests that members of other religious groups residing in that state cannot obtain the same deferment on submission of similar proof. Certainly, the effect of awarding qualified registrants a IV-D deferment—or, for that matter, any other deferment —will be an earlier call-up for those who, like petitioner, cannot demonstrate that they are entitled to any deferment or exemption. But this does not suggest unwarranted preferential treatment; those receiving deferments are reclassified 1-A on the expiration of their deferred status.'

'The additional argument by petitioner relating to his motion for a bill of particulars (Pet. 32-33) was properly disposed of below (Pet. App. 6). Petitioner made no showing at trial of lack of compliance with the order partially granting his motion; nor did he raise any objection to that order. At trial, he called the Colorado State Director and questioned him both as to the general policy for granting IV-D deferments in that state, and as to the processing by Selective Service of his own claim; there was nothing to suggest, even inferentially, that petitioner's order of call was improper. On the contrary, the state director testified that petitioner's 1969 induction had not been accelerated. There is thus no cause for ordering production of additional documents sought by petitioner.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1971.

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